

Violating Our Civil Rights

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By Rep. Anna G. Eshoo

Palo Alto Daily News

Earlier this month, Congress hurriedly passed legislation making the most significant changes to the government's power to conduct intelligence surveillance since the enactment of the Foreign Intelligence Surveillance Act, or "FISA," in 1978. FISA, which has been modified more than 50 times, was designed to rein in rampant abuses by the intelligence community and the executive branch during the 1960s and '70s. The new law opens the door to the same abuses of that era and threatens to eviscerate the legal framework and civil liberty protections that FISA established.

Uncovering abuse

In the aftermath of Watergate and revelations that domestic spy agencies were routinely surveilling American citizens, the Senate formed a committee led by Sen. Frank Church (D-Idaho) in 1975. The committee undertook the first comprehensive examination of the National Security Agency, the CIA and other modern U.S. intelligence agencies since their formation after World War II.

What the Church Committee uncovered was an extraordinary abuse of the Constitution and American civil liberties by the nation's intelligence community. NSA's "Operation Shamrock" collected and analyzed every telegraphic message entering into or exiting from the United States, and the CIA used this intelligence to spy on political dissidents and civil rights leaders. The CIA's "Operation CHAOS" and the FBI's "COINTELPRO" kept tabs on American students and war protesters. And the White House had under its employ "plumbers" tasked with conducting intelligence operations to target political opponents of the Nixon administration.

Congress responded by creating a legal framework that protects our national security and our constitutional rights. The underlying premise of FISA is that all domestic surveillance of American citizens must comport with the Fourth Amendment and that purely foreign intelligence is largely beyond the reach of U.S. law. However, when American intelligence and law enforcement need to investigate foreign targets operating within our country, FISA recognizes that judicial oversight and a legal framework are necessary so that the rights of Americans are protected, not swept into the surveillance.

In recent weeks, our intelligence agencies reported to Congress a "hole" in our intelligence gathering due to advances in modern telecommunications. Specifically, the problem they identified results from the fact that many telephone calls, e-mails and text messages originating from overseas are routed through U.S. telecommunications facilities, even if the ultimate destination of the communication is also foreign. The FISA court required warrants to intercept these communications even though the contact with the U.S. seemed somewhat incidental.

The bipartisan congressional leadership and the House and Senate Intelligence committees overwhelmingly supported fixing this surveillance gap, and proposed statutory changes to do so.

But the legislation that passed through Congress in the waning hours before the August recess is an extraordinary departure from a law that has protected our country and our rights. It now provides authority to the attorney general to authorize surveillance of communications into and out of the United States with minimal judicial review only after the fact. The law enables the NSA without a court order to monitor calls or e-mails by American citizens to people living abroad. Supervision of this sweeping power is based on the judgment and authority of the attorney general.

Oversight needed

In fact, no attorney general should supervise this effort. The FISA court should ... just as it has, successfully, since 1978.

In essence, the Bush administration is saying "trust us," but our civil liberties should not depend on a matter of trust. Our country's own recent history demonstrates that these basic freedoms must be protected by a legal framework and the rule of law. The new FISA legislation recently enacted by Congress does not accomplish this and it should be amended by Congress if it is not overturned by the judiciary first.

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